

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of Minnesota Power's Petition for
Review of an Agreement Between Minnesota
Power and American Transmission Company

ISSUE DATE: December 2, 2005

DOCKET NO. E-015/PA-04-2020

ORDER APPROVING TRANSFER SUBJECT
TO CONDITIONS, REQUIRING FURTHER
FILINGS, AND DENYING
RECONSIDERATION OF EARLIER ORDER
ON THE MERITS

PROCEDURAL HISTORY

On September 24, 2004, the Commission issued an Order requiring Minnesota Power to make a filing under Minn. Stat. § 216B.50 – the statute governing utility mergers and utility property transfers – before transferring any ownership interest in any asset associated with the Arrowhead Project. The Arrowhead Project consists of a proposed 12.5-mile, 345 kV/115 kV and 345 kV/230 kV high-voltage transmission line, running from the Company's Arrowhead substation in Hermantown, Minnesota, to the Wisconsin border at Oliver, Wisconsin. The Order also required the Company to make a filing explaining any determination it might reach that a § 216B.50 filing was not required.¹

On December 23, 2004, Minnesota Power made the filing required under the September 24 Order, filing its "Design and Construction Agreement" with the American Transmission Company. That filing stated that the Company intended to transfer the Arrowhead Project to the American Transmission Company (ATC) and argued that the Commission had no jurisdiction over its transaction with ATC, based on two claims:

- a. Under the terms of the parties' "Design and Construction Services Agreement," ATC would already own the project by the time it became an "operating unit or system" under the property transfer statute, Minn. Stat. § 216B.50.
- b. Under the terms of the Design and Construction Services Agreement, Minnesota

¹ *In the Matter of the Complaint of NAWO and SOUL Against Minnesota Power Regarding the Arrowhead Transmission Line Project*, Docket No. E-015/C-04-955, Order Dismissing Complaint and Requiring Future Filing (September 24, 2004).

Power was simply acting as ATC's general contractor – no property that met the statutory standard of “any plant as an operating unit or system” had been, was being, or would be sold, acquired, leased, or rented for consideration in excess of \$100,000.

On June 1, 2005, the Commission rejected these arguments, found that the transaction required Commission approval to proceed, and found that the record was inadequate to determine whether the transaction was “consistent with the public interest,” as required under Minn. Stat. § 216B.50.² The Commission delegated the task of initial record development to its staff, noting that this would not foreclose any formal evidentiary proceedings that might prove to be necessary.

On June 22, 2005, ATC filed a petition to intervene in the case, which was granted.

Both ATC and Minnesota Power filed comments and responded to discovery requests in the course of the record development coordinated by staff. North American Water Office and Save Our Unique Lands, original complainants in the case that produced the Order requiring the filing at issue,³ also filed comments.

On October 6, 2005, the case came before the Commission for decision.

FINDINGS AND CONCLUSIONS

I. Factual Background

A. The Project

The Arrowhead Project consists of a proposed 12.5-mile, 345-kV, high-voltage transmission line, running from Minnesota Power's Arrowhead substation in Hermantown, Minnesota to Oliver, Wisconsin, where it will connect with the 208-mile, 345-kV Arrowhead-Weston high-voltage transmission line. The project includes adding upgraded equipment and capacity to Minnesota Power's Arrowhead substation. And it includes removing Minnesota Power's existing 115-kV transmission line and relocating it on the towers supporting the new, 345-kV line.

² Order Asserting Jurisdiction and Requiring Further Fact-Finding, this docket, June 1, 2005.

³ *In the Matter of the Complaint of NAWO and SOUL Against Minnesota Power Regarding the Arrowhead Transmission Line Project*, Docket No. E-015/C-04-955, Order Dismissing Complaint and Requiring Future Filing (September 24, 2004).

B. The Transaction

Minnesota Power's petition explained that Minnesota Power had originally planned to own the Arrowhead Project and had recorded some \$2,588,877 in its regulated accounts as Construction Work in Progress. As work progressed, however, the Company became convinced that ATC, Minnesota Power, and Minnesota Power ratepayers would all benefit if ATC owned the line, consolidating its costs and their recovery with those of the longer line of which it would be a part. In January 2004, the Company changed its accounting to reflect non-ownership of the Arrowhead Project.

The 15-page Design and Construction Service Agreement (the Agreement) between Minnesota Power and the American Transmission Company places responsibility for the design and construction of the Arrowhead Project on Minnesota Power, but contemplates ultimate ownership of the project by ATC. Under the Agreement, Minnesota Power bills ATC monthly for project costs, which include the cost of equipment, supplies, materials, easements, rights-of-way, regulatory costs and fees, and related expenses. Total project costs are expected to amount to some \$48,000,000.

The Agreement provides that title to materials, supplies, and equipment passes to ATC upon delivery to the work site and that title to the project as a whole passes to ATC when the project is completed and has been placed in service.⁴ The Agreement also provides that its effectiveness is contingent upon receiving all required regulatory approvals.⁵

ATC and Minnesota Power state that they also intend to execute an Operation and Maintenance Agreement, under which Minnesota Power will be responsible for the maintenance and operation of the Project after the line is energized. This agreement is currently being negotiated and will be filed when completed.

II. The Legal Standard

The statute requiring Commission review of utility property transfers reads as follows:

No public utility shall sell, acquire, lease, or rent any plant as an operating unit or system in this state for a total consideration in excess of \$100,000, or merge or consolidate with another public utility operating in this state, without first being authorized so to do by the commission. Upon the filing of an application for the approval and consent of the commission thereto the commission shall investigate, with or without public hearing, and in case of a

⁴ Article VIII, A.

⁵ Article IX.

public hearing, upon such notice as the commission may require, and if it shall find that the proposed action is consistent with the public interest it shall give its consent and approval by order in writing. In reaching its determination the commission shall take into consideration the reasonable value of the property, plant, or securities to be acquired or disposed of, or merged and consolidated. The provisions of this section shall not be construed as applicable to the purchase of units of property for replacement or to the addition to the plant of the public utility by construction.

Minn. Stat. § 216B.50.

III. Positions of the Parties

Minnesota Power and ATC urged the Commission to approve the transfer, arguing that it was consistent with the public interest because it would provide significant reliability benefits to Minnesota Power's ratepayers at no cost to them.

SOUL and NAWO argued that the transaction required further scrutiny before it could be found to be in the public interest. They pointed to the transaction's convoluted history and its earlier lack of transparency as demonstrating cause for concern. They expressed particular concern that fiber optic cable being installed as part of the Project might be used for commercial purposes without adequate compensation to the landowners hosting the project. And they urged the Commission to further investigate the possibility that ATC and Minnesota Power were affiliated entities.

Neither the Department of Commerce, which had concurred in Minnesota Power's earlier claim that the Commission lacked jurisdiction over this transaction, nor the Residential Utilities Division of the Office of the Attorney General (RUD-OAG), which had earlier urged further scrutiny of the transaction, filed written comments at this juncture.

At hearing, however, both parties offered oral comments. The Department of Commerce stated that it concurred with the analysis in Commission Staff's briefing materials, which concluded that the transaction was consistent with the public interest. The RUD-OAG suggested that the Commission require Minnesota Power and ATC to make a new filing under recently enacted legislation permitting regulated utilities to transfer transmission assets to transmission companies, subject to Commission approval.⁶

IV. Summary of Commission Action

The Commission finds that the transfer of the Arrowhead Project to ATC is consistent with the public interest and should be approved, subject to three conditions:

⁶ Minn. Stat. § 216B.16, subd. 7c.

- (1) The costs and compensation associated with the transaction will remain subject to review in an appropriate ratemaking proceeding, such as the Company's next general rate case.
- (2) Both ATC and Minnesota Power must ensure that Minnesota Power retains adequate access to the poles and rights-of-way associated with the project for the Company to continue to serve its retail load with no degradation in service or increase in cost.
- (3) All subsequent agreements between ATC and Minnesota Power affecting the Arrowhead Project in any way must be filed for review by the Commission.

Finally, the Commission will affirm its June 1, 2005 Order asserting jurisdiction over this transaction, denying on the merits the petition for reconsideration filed by the Company.

These decisions will be explained in turn.

V. The Transfer of the Arrowhead Project to ATC is Consistent with the Public Interest.

Despite the convoluted history of this case, the issue before the Commission at this point is straightforward: is Minnesota Power's proposed transfer of the Arrowhead Project to ATC consistent with the public interest, as required for its approval under Minn. Stat. § 216B.50? The Commission concludes that it is. Subject to the three conditions described above, there is no reasonable likelihood that the transfer will harm ratepayers, and there is a reasonable likelihood that it will benefit them.

A. No Reasonable Likelihood of Ratepayer Harm

First, and most importantly, the transfer presents no reasonable likelihood of ratepayer harm. Unlike the assets in most transfer cases, the Arrowhead Project has never been in rate base; ratepayers have not been charged for its planning, construction, or maintenance. This eliminates the usual need for rigorous scrutiny of past utility investment and the proposed purchase price, to ensure adequate compensation for ratepayer-funded investments.

Nor is Minnesota Power jeopardizing its financial ability to make necessary investments to meet its service obligations by constructing the Project. Under the terms of the Agreement, ATC must promptly reimburse Minnesota Power for all amounts expended on the Project, minimizing if not eliminating the financial constraints the Project might otherwise impose on the Company.

Nevertheless, the Commission will condition approval of this transfer on retaining the right to examine and account for its financial effects in a future ratemaking proceeding. No business transaction is completely free of risk and uncertainty, and none of the risk or uncertainty of this transaction should be borne by ratepayers. The best vehicle for ensuring that this does not happen

– by gauging the overall financial impact of the transaction on Minnesota Power and ensuring that it has no negative impact on rates – is clearly a comprehensive rate proceeding.

Similarly, the Commission will condition approval of this transfer on both parties taking all necessary steps to ensure that Minnesota Power continues to have adequate access to the 115-kV line connecting its Arrowhead substation with its distribution system. That line, which is critical to the Company’s provision of adequate and reliable retail service, will be placed on poles owned by ATC. The public interest requires that ATC, or any subsequent owner of the poles, grant the Company adequate access to enable it to serve its retail customers with no degradation in service quality and no increase in cost.

And finally, the Commission will condition approval of this transfer on Minnesota Power and ATC filing for Commission review all future agreements between them affecting the Arrowhead Project in any way. This is a complex transaction, and many agreements ancillary to the transfer of title, including the two companies’ interconnection agreement and their operation and maintenance agreement, have yet to be completed. The public interest requires the Commission to review these and similar agreements, which carry the potential to change the parties’ relationship and affect the interests of Minnesota ratepayers.

With these conditions, however, there appears to be no reasonable likelihood that this transfer could result in injury to ratepayers, the threshold issue in determining whether a transfer meets the “consistent with the public interest” standard of Minn. Stat. § 216B.50.

B. A Reasonable Likelihood of Ratepayer Benefit

Not only does there appear to be no reasonable likelihood of ratepayer harm from the proposed transfer, but there appears to be a reasonable likelihood of ratepayer benefit.

The new 12.5-mile, 345-kV transmission line is likely to improve Minnesota Power’s system reliability in at least three ways: (1) It should reduce the likelihood of system failures by adding redundancy; (2) It should increase the Company’s flexibility in managing power flows by adding additional transmission paths; (3) It should reduce line-loading by adding increased capacity. Increased reliability is clearly a benefit to ratepayers, and increased reliability at no cost is an even greater benefit.

Similarly, the relocation – at no cost to ratepayers – of Minnesota Power’s existing 115-kV line from the 25-year-old wooden poles currently supporting it to the new steel structures supporting the new, 345-kV line will provide ratepayer benefits. The new infrastructure will provide longer service lives and lower maintenance expense than the existing infrastructure, at no additional cost.

And finally, ATC’s designation of Minnesota Power to operate and maintain the new 345-kV transmission line will benefit ratepayers by ensuring that their needs, and the needs and characteristics of the Minnesota grid, are understood and taken into account in the management and operation of this significant, new transmission asset.

Given these likely ratepayer benefits and the absence of ratepayer harm, the Commission finds that the proposed transfer is consistent with the public interest and should be approved under

Minn. Stat. § 216B.50.

C. Intervenor's Concerns Have Been Adequately Addressed

SOUL, NAWO, and the RUD-OAG all raised important concerns, which the Commission believes have been or can be effectively addressed without withholding approval of the proposed transfer.

The SOUL/NAWO concern that Minnesota Power and ATC may be affiliated entities has been effectively addressed by the parties' demonstrations that neither of them holds any ownership interest in the other, that they share no directors or officers, and that neither of them exercises substantial influence over the policies and actions of the other. They are clearly not affiliates under Minn. Stat. § 216B.48.

Similarly, SOUL/NAWO concerns about the potential for improper or illegal use of the fiber optic cable being installed as part of the Project – while premature at this point – have been effectively addressed by ATC's commitment not to permit the use of the cable for purposes other than monitoring, operating, and protecting the transmission grid, or for use by governmental agencies,⁷ as well as by Minnesota Power's statement at hearing that ATC will not permit it to use the cable for commercial purposes.

Finally, the RUD-OAG's jurisdictional concern – that it might clarify the Commission's authority over ATC and the Arrowhead Project to require the parties to re-file the petition under recently enacted legislation governing transmission companies – has been effectively addressed in at least two ways. First, ATC has repeatedly assured the Commission and all parties that it intends to participate, and looks forward to participating, in the biennial transmission planning process, the state's primary vehicle for monitoring and strengthening the Minnesota grid.

Second, and more importantly, the statutory language itself grants the Commission ample regulatory authority over transmission companies, including ATC. The Commission has jurisdiction over these companies under the transmission planning process statute, the preventative maintenance statute, the certificate of need statute, and the regulatory assessment statute, among others.⁸

D. Conclusion

Having found no reasonable likelihood of harm to ratepayers, having found a reasonable likelihood of benefit to ratepayers, and having examined intervenors' concerns and found them adequately addressed, the Commission will give its consent and approval to the proposed transfer under Minn. Stat. § 216B.50.

⁷ August 8, 2005 Reply Comments of ATC, page 10.

⁸ Minn. Stat. §§ 216B.2425, subd. 2 (a) (1); 216B.79; 216B.243, subd. 6; 216B.62, subd. 5a.

VI. June 1, 2005 Order Affirmed

On August 16, 2005, the Commission issued an Order granting, for procedural purposes, Minnesota Power's petition for reconsideration of the June 1 Order asserting jurisdiction over its transfer of the Arrowhead Project to ATC.⁹ That Order granted reconsideration only for purposes of tolling the statutory deadline, stating the Commission would take up the merits of the request at the conclusion of the proceeding. That time has come, and the Commission will now deny reconsideration on the merits.

The Company's petition does not raise new issues, does not point to new and relevant evidence, does not expose errors or ambiguities in the June 1 Order, and does not otherwise persuade the Commission that it should rethink its original decision. The Commission concludes that the original decision is the one most consistent with the facts, the law, and the public interest, and will therefore deny the petition for reconsideration.

Finally, under Minn. Stat. § 216B.26, the Commission may specify the date on which an Order becomes effective. The Commission will specify that Part VI of today's Order, denying reconsideration of the June 1 Order, will become effective on the date that all reconsideration proceedings on today's Order are concluded. This will serve the interests of administrative and judicial economy by limiting any potential appeals in this case to a single proceeding.

The Commission will so order.

ORDER

1. The Commission hereby finds the proposed transfer of the Arrowhead Project from Minnesota Power to the American Transmission Company (ATC) to be consistent with the public interest and gives its consent and approval under Minn. Stat. § 216B.50, subject to the following conditions:
 - (a) The costs and compensation associated with the transaction shall remain subject to review in an appropriate ratemaking proceeding, such as Minnesota Power's next general rate case.
 - (b) Both ATC and Minnesota Power shall ensure that Minnesota Power retains adequate access to the poles and rights-of-way associated with the Arrowhead Project for Minnesota Power to continue to serve its retail load with no degradation in service or increase in cost.
 - (c) Minnesota Power shall file for Commission review all subsequent agreements between itself and ATC that affect the Arrowhead Project in

⁹ Order Granting Reconsideration and Deferring Action on the Merits, this docket, August 16, 2005.

any way.

2. The Commission denies the application for rehearing filed by Minnesota Power on June 21, 2005. This paragraph shall become effective on the date that all reconsideration proceedings on today's Order are concluded.
3. This Order shall become effective immediately, with the exception noted in ordering paragraph 2.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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